

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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| In the Matter of the Nebraska Public Service |) | Application No. NUSF-1 |
| Commission, on its own motion, seeking to |) | |
| establish guidelines for administration of the |) | PROGRESSION ORDER NO. 18 |
| Nebraska Universal Service Fund. |) | |

Post-Hearing Brief of The Rural Independent Companies

I. Introduction and Issues Presented

The Rural Independent Companies (the “Companies”)¹ hereby submit this post-hearing brief in the above-referenced docket. The Companies appreciate the opportunity to respond to the evidence presented at the hearing conducted in this proceeding on December 5, 2006.

The issues that the Companies will address in this Post-Hearing Brief are as follows:

- (1) Whether the Federal Communications Commission (the “FCC”) has preempted the authority of this Commission to assess the Nebraska Universal Service Fund (“NUSF”) surcharge on the intrastate portion of the revenues of interconnected VoIP service providers.
- (2) Whether this Commission should conclude that interconnected VoIP service providers offer telecommunications service, and in accordance with applicable Nebraska law are therefore required to contribute to the NUSF.
- (3) Whether the safe harbor mechanism identified in the USF Contribution Order should be adopted by this Commission as the basis for determining the contribution of interconnected VoIP service providers to the NUSF.

II. Factual and Regulatory Background

¹ The Companies are: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Co., K & M Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom Inc., and Three River Telco.

A. The Telecommunications Act of 1996.

In 1996, Congress enacted legislation altering the telecommunications landscape, the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56, codified as amended at scattered sections of Title 47 of the United States Code (the "Telecommunications Act"). The express purposes of the Telecommunications Act are to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. Law. No. 104-104, 110 Stat. 56 (1996)

While seeking to promote competitive markets for the provision of telecommunications services, Congress also sought to preserve the goal of "universal service" as defined in the Telecommunications Act. 47 U.S.C. § 254(c) Congress directed the FCC to establish a Federal-State Joint Board to assist in implementing the universal service principles in the Telecommunications Act. 47 U.S.C. § 254(a) These principles of universal service include: (1) "Quality services should be available at just, reasonable, and affordable rates ...;" (2) "Access to advanced telecommunications and information services should be provided in all regions of the Nation ...;" (3) "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services ... that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas ...;" (4) "All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of

universal service ...;" and (5) "There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service...." 47 U.S.C. § 254(b).

States are provided authority to support universal service in the Telecommunications Act. Specifically, states are permitted to "adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." 47 U.S.C. § 254(f) This subsection further provides that:

Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the state, to the preservation and advancement of universal service in that state. A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden federal universal service support mechanisms."

B. The NUSF Act and this Commission's Implementation of the NUSF Act.

In 1997, the Nebraska Legislature enacted the Nebraska Telecommunications Universal Service Fund Act (the "NUSF Act"), 1997 Neb. Laws, LB 686 (codified at Neb. Rev. Stat. §§ 86-1401 to 86-1410 (Supp. 1997)). The NUSF Act has been amended and is currently found at Neb. Rev. Stat. §§ 86-316 to 86-829 (Cum. Supp. 2004). The purpose of the NUSF Act is to authorize the NPSC "to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices." Neb. Rev. Stat. § 86-317 (Cum. Supp. 2004) The NUSF Act creates the NUSF which "shall provide the assistance necessary to make universal access to telecommunications services available to all persons in the state consistent with the policies set forth in the Nebraska Telecommunications Universal Service Fund Act." Neb. Rev. Stat. § 86-324(1) (Cum. Supp. 2004) The Fund level is

established annually by the NPSC. Neb. Rev. Stat. § 86-328 (Cum. Supp. 2004); 291 NAC 10.002.01

The NUSF Act directs that this Commission “shall require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law.” Neb. Rev. Stat. § 86-324(2)(d) (Cum. Supp. 2004) “Telecommunications company” is defined in the NUSF Act as “any natural person, firm, partnership, limited liability company, corporation, or association offering telecommunications service for hire in Nebraska intrastate commerce without regard to whether such company holds a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier from the commission.” Neb. Rev. Stat. § 86-322 (Cum. Supp. 2004) The NUSF Act authorizes this Commission to adopt and promulgate rules and regulations “as reasonably required” to implement and operate the NUSF. Neb. Rev. Stat. § 86-325 (Cum. Supp. 2004)

Consistent with this authority, this Commission has adopted rules to implement the NUSF Act, 291 NAC 10 (“NUSF Rules”). The NUSF Rules provide that the NUSF surcharge shall be assessed on all end-user telecommunications services provided in Nebraska intrastate commerce. 291 NAC 10.002.01 “Telecommunications service” is defined as “the offering of telecommunications for a fee.” 291 NAC 10.001.01X “Telecommunications” is defined as “the transmission, between or among points specified by the subscriber, of information of the subscriber’s choosing, without a change in the form or content of the information as sent or received.” 291 NAC 10.001.01V The

NUSF Rules provide that the NUSF surcharge shall not be assessed on interstate telecommunications services. 291 NAC 10.002.01D

In cases where a charge is made to a subscriber for both intrastate and interstate telecommunications service, and the interstate service is not charged separately or cannot be readily determined, the NUSF surcharge applies to the total charge, unless in cases in which the intrastate portion cannot be determined, or if such determination would result in an undue administrative burden, NPSC establishes an allocation factor to determine the intrastate portion of the service or may adopt relevant FCC safe harbor provisions. 291 NAC 10.002.01D1a and 10.002.01D1b

C. The *USF Contribution Order*² and this Commission's investigation of appropriate contributions by interconnected VoIP service providers to the NUSF.

In the *USF Contribution Order*, the FCC established universal service contribution obligations for providers of interconnected VoIP service, and raised the interim wireless safe harbor from 28.5% to 37.1%.³ The purpose for such actions was:

[T]o provide stability while we continue to examine more fundamental reform. The interim changes we make in this Order are essential for securing the viability of universal service – a fundamental goal of communications policy as expressed in the Communications Act – in the near-term.⁴

The FCC confirmed the definition of “interconnected VoIP service” as provided in 47 C.F.R. Sec. 9.3.⁵

² *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, CC Docket No. 96-45, 2006 WL 1765838, Report and Order and Notice of Proposed Rulemaking (rel. June 27, 2006) (the “USF Contribution Order”).

³ *Id.* at para. 2.

⁴ *Id.* at para. 1.

⁵ *Id.* at para. 36. Interconnected VoIP service is “a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet

Following the FCC's issuance of the *USF Contribution Order*, on September 26, 2006, this Commission initiated the instant proceeding and requested carrier input with regard to a proposal to require providers of interconnected VoIP service in Nebraska to contribute to the NUSF based on the FCC's safe harbor allocation factor. Pre-filed testimony and comments were filed on November 17, and a hearing was conducted on December 5 at which testimony and exhibits were received by this Commission.

III. This Commission is not pre-empted from assessing the NUSF surcharge on the Nebraska intrastate revenues derived from interconnected VoIP service.

Only one entity that participated in this proceeding, Level 3 Communications, LLC ("Level 3"), asserted that the FCC has exclusive jurisdiction concerning interconnected VoIP service "no matter what the regulatory issue may be."⁶ The Companies submit that, as demonstrated below, this conclusion is not supported by the relevant FCC Orders.

Level 3 contends that in the *Vonage Order*⁷ "the FCC asserted its exclusive jurisdiction over interconnected VoIP service and preempted state utilities commissions from asserting separate jurisdiction over interconnected VoIP services."⁸ The *Vonage Order* does not support this claim. In footnote 46 of the *Vonage Order* the FCC stated:

We do not determine the statutory classification of DigitalVoice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future. These issues are

protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network."

⁶ See, Pre-filed Testimony of Greg L. Rogers at p. 5.

⁷ *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (FCC rel. Nov. 12, 2004) ("*Vonage Order*").

⁸ *Ibid.* at p. 3.

currently the subject of our *IP-Enabled Services Proceeding* where the Commission is comprehensively examining numerous types of IP-enabled services, including services like Digital Voice. *See generally IP-Enabled Services Proceeding*, 19 FCC Rcd 4863. That proceeding will resolve important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice, *concerning issues such as the Universal Service Fund . . . and the extent to which states have a role in such matters.* (emphasis added)

Later in the same footnote the FCC observed:

By ruling on the narrow jurisdictional question here, we enable this Commission and the states to focus resources in working together along with the industry to address the numerous other unresolved issues related to this and other IP-enabled and advanced communications services that are of paramount importance to the future of the communications industry.

To the extent that any confusion existed as to the limited nature of its ruling in the *Vonage Order*, the FCC further stated:

[W]e have yet to determine final rules for a variety of issues discussed in the *IP-Enabled Services Proceeding*. While we intend to address the 911 issue as soon as possible, perhaps even separately, *we anticipate addressing other critical issues such as Universal service . . . in that proceeding.*⁹

While the FCC requested comments regarding the universal service contribution obligations of both facilities-based and non-facilities-based providers of IP-enabled services in the *IP-Enabled Services Proceeding*,¹⁰ but has not yet made a ruling in such Proceeding, this subject has been addressed in the *USF Contribution Order*. As noted above, the FCC required interconnected VoIP service providers to contribute to the USF.

In its consideration of the percentage of revenues of interconnected VoIP service providers on which USF should be assessed, the FCC identified an “appropriate

⁹ *Vonage Order*, para. 44, citing to footnote 46 quoted above. The FCC also confirmed that it had declared in the *Vonage Order* that it intended to resolve important regulatory matters such as the Universal Service Fund in the *IP-Enabled Services proceeding*. *See Id.*, para. 14.

¹⁰ *USF Contribution Order*, at para. 13.

analogue”, determined that wireline toll service was such an appropriate analogue and established a safe harbor of 64.9% as interstate revenues subject to USF assessment.¹¹ The FCC determined that an interconnected VoIP service provider “may rely on traffic studies or the safe harbor described above in calculating its federal universal service contributions.”¹² The FCC noted that this choice is equivalent to the choice that is available to CMRS carriers in connection with USF assessments.¹³

There is nothing contained in the *USF Contribution Order* that either explicitly or implicitly supports a conclusion that state commissions are precluded from ordering the assessment of a state USF surcharge on the intrastate portion of revenues derived from interconnected VoIP service. Further, by expressly comparing the choice of safe harbor or traffic measurement available to interconnected **VoIP service** providers with the similar choice available to CMRS carriers whose intrastate revenues have been and are obviously properly subject to state USF surcharge assessment (including NUSF surcharge assessment), the only reasonable conclusion is that the FCC anticipated and tacitly approved assessment of the NUSF surcharge on the Nebraska intrastate portion of interconnected VoIP service provider revenues.

The Commission should be mindful that the Communications Act of 1934 “establishes, among other things, a system of dual state and federal regulation over telephone service.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 360 (1986). The Eighth Circuit Court of Appeals has stated that the “FCC has authority to regulate interstate wire and radio communications, 47 U.S.C. § 151, but the Act specifically

¹¹ *Id.* at para. 53.

¹² *Id.* at para. 56.

¹³ *Id.* at para. 57.

denies the Commission [FCC] jurisdiction to regulate intrastate communications services, and leaves that authority with the States.” *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004) (citing 47 U.S.C. § 152(b); *cf. Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-151 (1930)).

In *Qwest Corp. v. Scott*, the Eighth Circuit determined that the Minnesota Commission’s authority relative to special access services was not preempted, stating as follows:

Reading all of the FCC’s pronouncements concerning special access services, including this most recent notice of rulemaking, we do not discern an intent of the Commission as yet to preclude all state regulation of these mixed-use services. Preemption ultimately is a political act in our federal system for which Congress or the Executive should be accountable. *The judiciary is not in a position to make this policy judgment, and “pre-emption is not to be lightly presumed.”*

380 F.3d at 374 (emphasis added) (citing *Calif. Fed. Sav. And Loan Ass’n. v. Guerra*, 479 U.S. 272, 281 (1987)). The guidance from the above-quoted holding of the Eighth Circuit is that FCC pre-emption of state commission jurisdiction must be manifested by express statement of such intention and cannot be “lightly presumed”.

The position of Level 3, and possibly others, that contend that this Commission has been pre-empted by the FCC from assessing the NUSF surcharge of interconnected VoIP service providers’ intrastate revenues is not sustainable. As such, this Commission has not been preempted from assessment of NUSF surcharge on Nebraska intrastate revenues derived from interconnected VoIP service.

IV. This Commission should conclude that interconnected VoIP service providers offer telecommunications service, and in accordance with applicable Nebraska law are required to contribute to the NUSF.

At the hearing on this matter, the pre-filed testimony of the Companies’ witness, Tom Bullock, was received in evidence as Exhibit 5. Mr. Bullock presented a brief

summary of such prefiled testimony at the hearing.¹⁴ Mr. Bullock offered his opinion that “Nebraska law directs the Commission to require that every ‘Nebraska interconnected VoIP provider’ contribute to the NUSF.”¹⁵ Mr. Bullock’s reasoning supporting this conclusion is based on the following analysis, and his conclusion should be adopted by the Commission in this matter.

First, according to the definition of “interconnected VoIP service” announced by the FCC in the *VoIP 911 Order*,¹⁶ it has been established that interconnected VoIP service permits users to receive calls from and terminate calls to the public switched telephone network (“PSTN”). Thus, providers of interconnected VoIP service must provide access to the PSTN, either by relying on their own facilities or by using others’ facilities, and transmission of user information necessarily occurs over such access facilities. Therefore, as the FCC concluded in the *USF Contribution Order*, such transmission constitutes the offering of “telecommunications” by interconnected VoIP service providers.¹⁷

Second, a “Nebraska interconnected VoIP service provider” should be defined as “an interconnected VoIP provider that provides interconnected VoIP service to subscribers in Nebraska for a fee.” This definition derives from the premise that a Nebraska interconnected VoIP service provider offers, for a fee, a service that includes the transmission, between or among points specified by the subscriber, of information of

¹⁴ Transcript at p. 15.

¹⁵ Exhibit 5 at p. 11.

¹⁶ *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257-58, para. 24 (2005). See, footnote 5 above for such definition.

¹⁷ *USF Contribution Order* at para. 41.

the subscriber's choosing, without a change in the form or content of the information as sent or received.¹⁸ Thus, Nebraska interconnected VoIP service providers offer "telecommunications service" as that term is defined in applicable Nebraska law.¹⁹

It should be noted that determination of this definition by the Commission is consistent with the Legislature's delegation of authority to this Commission to promulgate rules and regulations as reasonably required to develop, implement and operate the NUSF.²⁰ In the recent case of *Schumacher v. Johanns*, 272 Neb. 346 (2006), the Nebraska Supreme Court approved the legality of such delegation of authority to the Commission holding:

We conclude that these provisions [including 86-325] of the NTUSFA constitute reasonably adequate, sufficient, and definite standards for the guidance of the agency in the exercise of the power conferred upon it, and to enable those affected to know and understand their rights and obligations. [citation omitted] Regulation of the telecommunications industry is a complex field as to which the PSC has special expertise and constitutional authority. The fact that the standards set forth in the NTUSFA permit the exercise of discretion by the PSC in its implementation reflects this reality.

272 Neb. at 369-70. The Court further stated that:

The NTUSFA is specific legislation on a subject which the state Constitution generally entrusts to the PSC, namely, the regulation of communications rates and services. It authorizes the PSC to establish a new means of achieving a long-standing goal of universal service by replacing subsidies which had previously been implicit in rates set by the PSC with explicit subsidies administered through the Fund.

¹⁸ See, Neb. Rev. Stat. § 86-117 (2004 Cum. Sup.) and Neb. Admin. Code Title 291, Ch. 10, § 001.01V for the definition of "telecommunications" under Nebraska law.

¹⁹ Neb. Rev. Stat. § 86-121 (2004 Cum. Sup.) states that "Telecommunications means the offering of telecommunications for a fee." See, Exhibit 5, pp. 6-9 for Mr. Bullock's discussion of the interrelationships of applicable definitions.

²⁰ See, Neb. Rev. Stat. § 86-325 (2004 Cum. Sup.).

272 Neb. at 366. Thus, this Commission possesses authority to define “Nebraska interconnected VoIP service provider” as set forth above.

Third, the Commission should adopt the FCC’s determination expressed in its *USF Contribution Order* that interconnected VoIP service is jurisdictionally mixed.²¹ (The appropriate level of contribution by Nebraska interconnected VoIP service providers is more fully discussed in the following section of this Brief.)

Fourth, the Commission should conclude that a Nebraska interconnected VoIP service provider offering a jurisdictionally mixed service includes telecommunications service offered for hire in Nebraska intrastate commerce, and is, therefore, a “telecommunications company” as that term is defined in Nebraska law for NUSF purposes.²² Section 86-324(2)(d) of the Nebraska Revised Statutes provides that “the commission . . . [s]hall require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law.”²³

Finally, based upon the foregoing reasoning, the Commission should conclude that Nebraska interconnected VoIP service providers offer telecommunications service, and in accordance with applicable Nebraska law are telecommunications companies required to contribute to the NUSF in a manner consistent with other telecommunications companies operating in this State.

V. The safe harbor mechanism identified in the *USF Contribution Order* should be adopted by this Commission as the basis for determining the contribution of interconnected VoIP service providers to the NUSF.

²¹ See *USF Contribution Order*, para. 42.

²² See Neb. Rev. Stat. § 86-322 (2004 Cum. Sup.).

²³ Neb. Rev. Stat. § 86-324(2)(d) (2004 Cum. Sup.).

The FCC, in its *USF Contribution Order*, permitted interconnected VoIP service providers to choose among three options for separating interstate and international telecommunications revenues from intrastate telecommunications revenues. These options are:

- 1) Use the interim safe harbor set in the order (i.e., 64.9% interstate);
- 2) Use actual interstate and intrastate revenues; or
- 3) Use an FCC-approved traffic study.²⁴

In Mr. Bullock's testimony, he recommended that the Commission should permit Nebraska interconnected VoIP service providers to elect among the same options provided by the FCC, but that Nebraska interconnected VoIP service providers should be required to use the same option for purposes of reporting to the Commission as they have chosen for purposes of reporting to the FCC on Forms 499-A and 499-Q for the same reporting period.²⁵ Based upon the pre-filed testimony of NUSF Director, Jeff Pursley, the NUSF Department also supports the availability of the allocation options identified by the FCC for use by Nebraska interconnected VoIP service providers.²⁶

One final sub-issue should be addressed in connection with resolving the allocation of an interconnected VoIP service provider's intrastate revenues among multiple states. Mr. Bullock discussed this issue in his pre-filed testimony and opined that either the customer's registered location or the customer's billing address could be used to determine the state with which to associate intrastate revenues of an interconnected VoIP service provider. The Companies submit that use of the customer's

²⁴ See *USF Contribution Order*, paras. 52-57.

²⁵ See, Exhibit 5 at p. 11.

²⁶ See, Exhibit 6 at p. 4.

billing address probably makes the most sense in determining the state with which to associate the intrastate portion of such revenues. While registered location is needed in connection with E911 administration, such information may not be available to billing systems for revenue analysis. However, billing address information is readily available and provides a fair and reasonable identifier of revenues derived by the Nebraska interconnected VoIP service provider in connection with the provision of its services in this State.

VII. Conclusion

The Companies advocate that based upon the evidence and reasoning set forth above, the issues presented in Section I above should be resolved in the following manner:

- (1) The FCC has not preempted the authority of this Commission to assess the NUSF surcharge on the intrastate portion of the revenues derived from the provision of interconnected VoIP service and thus, this Commission retains authority to assess the NUSF surcharge on such revenues.
- (2) The Commission should conclude that Nebraska interconnected VoIP service providers offer telecommunications service, and in accordance with applicable Nebraska law are telecommunications companies required to contribute to the NUSF in a manner consistent with other telecommunications companies operating in this State.
- (3) The Commission should permit Nebraska interconnected VoIP service providers to elect among the same options provided by the FCC safe harbor mechanism identified in the *USF Contribution Order* as the basis for determining the contribution percentage of interconnected VoIP service providers to the NUSF, and the customer's billing address should be used as a fair and reasonable identifier of revenues derived by Nebraska interconnected VoIP service providers in connection with the provision of such service in this State.

Respectfully submitted,
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Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc,
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2007, the original and five (5) paper copies, together with an electronic copy, of the Post-Hearing Brief of the Rural Independent Companies was served upon Andy S. Pollock, Executive Director of the Commission, by hand-delivery and electronically, and upon the following parties by email:

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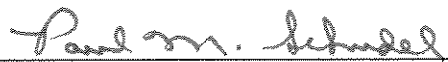
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